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At the 1972 National Association of Broadcasters Convention in Chicago, the assembled gathering was surprised to receive a mailed greeting from their sometimes adversary, President Richard Nixon, which claimed, "In no other country does the broadcaster have more freedom than in the United States, and I emphasize that my Administration is dedicated to preserving that heritage."[1] Four days later, however, the Justice Department filed against NBC, CBS, ABC, and Viacom International, then a CBS subsidiary in the business of syndicating television programming, an antitrust suit which alleged that the networks were guilty of various trade-restraining and monopolistic activities under Sections 1 and 2 of the Sherman Antitrust Act. Similar legal justification was offered thirty-four years earlier when the Justice Department initiated litigation that led to the decade-long Paramount Case. The resulting Paramount Decision of 1948 is not only the single most important antitrust decision to influence the American motion picture industry in the past half-century, but its theoretical implications and legal precedent have subsequently made a lasting impression on American network broadcasting. This essay is designed to investigate the seminal nature of the Paramount Decision as it has affected American television by focusing on the original Paramount litigation and tracing its implications for network monopolistic tendencies from 1948 through 1981.

I. The Paramount Litigation, 1938-1948

Officials from Allied States, an association representing many of the nation's independent theatre exhibitors,[2] first petitioned a House Judiciary

Committee in February 1937 to investigate monopolistic practices in the American motion picture industry. Spurred by additional complaints lodged by other independents over the next year, the Justice Department commenced legal action on July 20, 1938. In the formal grievance, Justice accused Hollywood's five major film studios, two additional producer-distributors, and another distributor[3] of conspiring to restrain trade in the production, distribution, and exhibition of motion pictures under Section 1 of the Sherman Antitrust Act.[4] These eight companies were also charged with attempting to monopolize the entire American movie business in violation of Section 2 of this same Sherman Act.[5] Ten years later the courts would eventually find the Paramount defendants guilty and order the five major movie companies to divest themselves of their respective theatre circuits.[6] There are three important aspects of this litigation to consider in reference to the issue of American network broadcasting and antitrust.

First, from the very outset of the Paramount litigation, the judicial assumption was that business and trade were being restrained, but not necessarily free speech. Since the initial complaints originated from independent exhibitors, the court's attention concentrated most heavily on the theatrical facet of the industry; the production and distribution of movies were relatively ignored. As a result, conspiracy to restrain trade in motion picture exhibition was clearly established as the dominant issue from the first consent decrees limiting the practice of block-booking in 1940.[7] The opening syllabus of the 1948 Supreme Court case actually cites twenty-five different trade improprieties committed by the eight Paramount defendants, including price-fixing, block-booking, blind-selling, and formula deals whereby feature films were licensed for entire circuits instead of by the desired "theatre by theatre, and picture by picture practice."[8] The court's attitude toward these restrictive practices would affect simultaneous and future broadcast proceedings as well.

Broadcasting, in fact, is specifically mentioned only once in the entire Supreme Court decision, but significantly, the comment occurs in such a way as to suggest the protection of broadcast material by the First Amendment. In the majority opinion, Justice William O. Douglas wrote:

> We have no doubt that moving pictures, like newspapers and *radio* [emphasis added] are included in the press whose freedom is guaranteed by the First Amendment. That issue would be focused here if we had any question concerning monopoly in the production of moving pictures. But monopoly in production was eliminated as an issue in these cases, as we have noted[9]

Tangentially, then, the Paramount Decision represents the first time the Supreme Court included radio as sharing freedom of the press guarantees under the first Amendment. This precedent would later be extended to include television.

The Paramount Decision's second important application for broadcasting is that the divestiture principle was not applied as forcefully as it might have been to "eliminate unlawful monopoly power, and eliminate vertical integration that is designed to have unlawful effects or that creates the power to bring about unlawful effects."[10] "Unlawful monopoly power" refers to the horizontal collusion among the eight Paramount defendants. "Vertical integration" refers to the intra-company capacity of production-distribution to supply a steady flow of product to corresponding theatre circuits. In the opinions of both the District and Supreme Court, this three-tiered vertical structure provided the five companies with an insurmountable advantage over any independent theatre owner, since the producer-distributor would always book its films into its own theatres and those of its fellow conspirators, instead of looking elsewhere to the independents.

Consequently, the Supreme Court upheld the 1946 decision of the District Court, affirming the guilt of the eight defendants. But the higher court remanded the case with a directive to reconsider the divestiture issue, which, in fact, was initially bypassed as a solution by the District Court.[11] The eventual outcome of the 1948 Supreme Court decision was that the lower court subsequently ordered divestiture of exhibition from the five major producer-distributors.[12] On the surface, this directive appeared to be a decisive step toward ensuring a free, open, and competitive movie marketplace. As time wore on, however, it became apparent that the power structure of the American movie business had actually changed very little as a result of divestiture.

In the first place, the eight Paramount defendants essentially formed the same formidable oligopoly 5, 10, 20, even 30 years after Paramount's final consent decrees were signed.[13] Obviously, horizontal relations were left pretty much intact by the Paramount directive. Secondly, in retrospect, the Supreme Court made a fundamental error by directing its attention toward exhibition in its dissection of vertical structure. Justice Douglas had written that "production was eliminated as an issue," as was distribution. But the power to exclude competition is even more formidable in the tiers of production and distribution than in that of exhibition. As a producer, a post-1948 movie company merely needed to manufacture less product, thus controlling exhibition by keeping supply low and demand high. As a distributor, a firm essentially determines what films get national exposure, when, and at what price. Despite divestiture, in fact, the independent exhibitor was actually worse off in the years immediately following Paramount than before the litigation.[14] And the weakness of the Paramount divestiture principle would come to have far-reaching implications for broadcasting.

The third and final Paramount theme relevant to broadcasting was the government's insistence on preserving the ideal of a free and open marketplace. In a 1938 article in *The New York Times*, a Justice Department official expressed the agency's goal at the outset of the Paramount litigation: "the theatres of the country will become a free, open and untrammeled market to which all producers may have access for the distribution licensing of films based on merit."[15] Furthermore, the "free, open and untrammeled market" is persistently used as justification for many District and Supreme Court decisions, whether or not the primary concern is, on one hand, preserving free speech or on the other, maintaining a relatively unrestrained business climate, as was the case in the Paramount Decision. These two intentions are intertwined because "a viable marketplace of ideas depends in large measure upon a competitive economic marketplace."[16] Nevertheless, a free and open marketplace is an outmoded ideal in corporate America and has subsequently led to mixed results in both the Paramount litigation and in later television antitrust proceedings.[17]

II. Network Broadcasting and Antitrust, 1938 - 1970

At the request of Congress, the Federal Communications Commission initiated an investigation of network broadcasting in 1938, the same year that the Paramount litigation began. This FCC inquiry and the corresponding legal proceedings eventually culminated in *U.S. v. NBC*[18] in 1943. In May 1941, the FCC had issued eight regulations for networking[19] that fundamentally "were designed to give affiliates greater freedom from network control, to enhance opportunities for the entry of new network and non-network programming sources, and to deconcentrate the industry."[20] The Supreme Court's 1943 NBC decision subsequently upheld the FCC's power to institute these rules.

Factually, there are many more differences than similarities between the NBC and Paramount litigations. First, both the technical scarcity argument[21] and the public interest mandate[22] were as much

used as justification for the Supreme Court decision in *U.S. v. NBC*, as was the intention to curb business improprieties, which, of course, was the primary legal rationale in the Paramount Case. Second, as in Paramount, the divestiture principle was employed as a solution to alter the strength and shape of the oligopoly formed by NBC Red, NBC Blue and CBS. This time, however, the FCC was responsible for the division,[23] and moreover, the split was made horizontally, rather than vertically: NBC was forced to sell one of its networks, and the Blue Chain became ABC. Additionally, the Mutual Radio Network was allowed the opportunity to prosper because of FCC rules that served to weaken NBC's and CBS's hold over their affiliates. In the end, America had four distinctly-owned radio networks as a result of the 1943 decision, and this structural transformation proved to be far more dramatic than the organizational upheaval subsequently imposed on the movie business by the Paramount Case.

Last and most significant, the dynamics of the regulatory process for broadcasting are much different from those for film. The FCC serves as a constant, if sometimes compliant, watchdog for the broadcast industry, wereas the movie business is self-regulated and more immediately subject to judicial review. Specifically, while the Paramount Decision is first and foremost an antitrust action, *U.S. v. NBC* is only indirectly concerned with monopoly and restraint of trade. The NBC Case is primarily an action defining the limits of power for the FCC. The considerable restructuring of the broadcast marketplace was entirely the result of FCC rulemaking, enforced, of course, by the Supreme Court's power of approval. Therefore, the 1948 Paramount Decision is the more significant antitrust action in terms of setting legal precedent for both the movie and broadcast industries, although the more striking structural conversion actually occurred as a result of the NBC litigation.

Nevertheless, the added competition provided by this conversion was as short-lived as it was striking. Post-World War II America saw the rapid evolution of network television, and in 1946, the FCC's original eight regulations for networking were extended to include TV.[24] The Mutual Network was never really successful in its ventures in the television marketplace, while ABC encountered early and serious financial difficulties.

By 1956, market conditions in the broadcasting industry had become so uncompetitive once more that simultaneous hearings were being undertaken by the House's Judiciary Committee and the Senate's Commerce Committee to investigate "the Network Monopoly" of NBC and CBS Television.[25] Senate John W. Bricker, author of the Congressional background report prepared for the Commerce Committee Wrote:

> It cannot be argued but that the two major networks are exercising good business judgment in attempting to make the maximum income possible at the least expense possible, *so far as outlets for their programs are concerned* [emphasis added]. Under ordinary circumstances this is commendable. However, it is equally true that in this case the exercise of this good business judgment acts to contravene, even destroy, the intent and objectives of the Congress to preserve competition and prevent monopoly in a truly nationwide and competitive system of television.[26]
>
> If allowed to continue, it is plain this pattern will bring about the financial bankruptcy of many stations now on the air; will act to prevent others from being established; will cut down on the service now being offered and, finally, will further entrench the two major networks, CBS and NBC. The net result promises to be *a chain of superpower affiliates located in only the larger cities of the country* [emphasis added].[27]

Remarkably, this commentary echoes accusations made against the major film studios and their corresponding theatre circuits in the Para-

mount Case. In the NBC Case, the network as distributor had been the main concern. Now, the behavior of the network-exhibitor, or the local affiliates, had emerged as the primary antitrust interest, while the actions of the network-distributors, NBC and CBS, became an ancillary concern. Thus, the vertically integrated structure of broadcast networking was now being emphasized as never before. Furthermore, the Paramount Decision itself was being cited for the first time as a model for dealing with monopolistic abuses in another mass communications industry.

Over the next fourteen years, the Paramount Case would be used as justification in one very important FCC action, the outlawing of option time on network television. Ultimately, the relative failure of the prime-time access rule would create the need for an even more pervasive application of the Paramount Decision during the 1970s.

In the most general sense, time optioning was a practice whereby a network reserved considerable blocks of the best available time for its programming by booking it in advance from local affiliates. This procedure not only assured the network of a ready and compliant market but inhibited the affiliates' use of programming from other networks and independent sources. Interestingly enough, time optioning closely resembles the former film industry practice of block booking,[28] which was declared illegal by restraint of trade in the Paramount Decision of 1948. The FCC's position on option time was first apparent during the NBC litigation. One of the Commission's eight original networking regulations issued in 1941 was specifically designed to limit the use of time optioning.[29] In 1946, this option time regulation was extended to include television. Then, when the FCC began investigating NBC, CBS and later ABC in the wake of the 1956 Congressional Hearings, the practice of time optioning emerged as the first concrete issue that the Commission acted upon.

The FCC's initial maneuver was an amendment issued in January 1961 that further restricted the practice of optioning time.[30] Although this was a step in the right direction in combating the network monopoly, many local affiliates and independent stations believed that time optioning should be abandoned altogether. One of these stations was KTTV of Los angeles, which in 1961 appealed the FCC decision to a U.S. Court of Appeals in Washington, D.C. Much to the consternation of the networks, the Department of Justice joined KTTV in the suit. Justice believed that time optioning was in violation of the Sherman Antitrust Act and that the Paramount Decision provided legal precedent. In response, the Appeals Court remanded the case to the FCC for further review. Accordingly, on September 4, 1963, the Commission issued a report and an order that completely prohibited the use of option time on television.[31] "The Commission further stated the opinion that . . . television programming would be improved since programs would have to stand or fall on their own merits."[32] Clearly, this rationale is identical to the argument articulated by the Supreme Court in the 1948 Paramount Case in its elimination of block booking.[33]

A second major action taken by the FCC during the 1960-1970 era was the establishment of the prime-time access rule.[34] The rule was part of the FCC's *1970 Report and Order on Network Television Broadcasting*,[35] and culminated more than a decade of research and investigation by the Commission. In 1957, the FCC was initially alarmed to find out that such a high percentage of prime-time programming, 28.7 percent, was solely produced by the networks. In 1968, this figure would drop to 19.6 percent, but the Commission determined that during this same time span the networks actually increased their control over the domain of prime-time by expanding their joint production arrangements from 38.5 percent to 75 percent.[36] Corresponding to these percentages were figures indicating that independently produced, prime-time programming dropped by 32.8 percent in 1957 to 5.4 percent in 1968.[37] This near-total market domination of America's evening television pro-

gramming by the three networks spurred the FCC to attempt a controversial and experimental solution.

On May 4, 1970, the FCC adopted the prime-time access rule in an attempt to stimulate more non-network programming sources by limiting the number of hours an affiliate could broadcast network programming during prime-time. In his concurring statement to this report and order, Commissioner Kenneth Cox alluded to both the eventual fate of the PTAR and the future litigations facing all three networks:

> If the Commission waters down its action here, or if the new rule does not in fact open up the market, then I think it possible that the Department will proceed under the antitrust laws to apply the policies developed in the motion picture industry (see, for example, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131) to broadcasting.[38]

The prime-time access rule went into effect on September 1, 1971, and has since met with mixed results in achieving its objectives.[39] In fact, hints of the eventual failure of the PTAR experiment were almost immediately apparent. Writing in a May 17, 1972, memorandum denying ABC's request to waive the PTAR during its broadcast of the 1972 Summer Olympics, FCC Chairman Dean Burch explained why he had written the dissenting statement in the original *1970 Report and Order*. "I opposed the prime-time access rule from the start. I did so not because of any quarrel with its objectives . . . but rather because I felt that it didn't work."[40] After further discussion and analysis of the PTAR, Burch described how the network proceedings would develop over the next decade:

> The U.S. Department of Justice, viewing this anticompetitive restraint on trade, has recently filed antitrust cases—*U.S. v. NBC*, C-72-819; *U.S. v. CBS*, C-72-820; *U.S. v. ABC*, C-72-821 (C.D. Col. filed April 14, 1972)—to bring the industry more closely into compliance with standards long applied to the motion picture industry. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1947).[41]

The FCC had spent fourteen years trying to devise ways to control the monoplistic behavior of the three networks but its ability to enact and enforce regulation was actually rather limited. In fact, the powers that be in television networking went relatively unchecked from the time of the 1956 Congressional Hearings until the FCC's *1970 Report and Order*. During the next decade, however, NBC, CBS, and ABC would confront a more formidable antagonist in the U.S. Department of Justice. As a result, the networks would find themselves in a predicament analogous to that of the major film studios some thirty years earlier: they too would face ten years of persistent antitrust pressure by Justice. As in the case of the Paramount Decision, the broadcasters would be forced to compromise their monopoly by signing consent decrees.

III. The Implications of the Paramount Decision for Network Television, 1970-1981

During the 1970s, the Paramount Decision influenced network television as never before. In the previous twenty years, Paramount had occasionally been cited — by either Congress, the FCC, or the Department of Justice — as the means of justifying the modification or elimination of particular trade restraining practices, such as time optioning. In the 1970s, however, the Justice Department was adamantly committed to weakening the structure of the three-network oligopoly in the broadcast market place. And the legal basis for this commitment was grounded entirely in the Paramount Decision.

It would be an oversimplification to suppose that the apparent failure of the prime-time access rule was the sole motivating force of the Justice Department's quick and vigorous attack on the

networks in the early 1970s. Certainly, from a regulatory point-of-view, the PTAR episode indicated that stronger measures were needed to curb the power of the networks; and, just as clearly, Justice was better suited to the task than the FCC. Still, if the prime-time access rule had been the sole reason stimulating the Justice Department's involvement, Attorney General John Mitchell probably would have waited until 1973 or 1974, when the PTAR could conclusively be judged a failure. But the Department of Justice's movement on the matter actually began covertly as early as 1969. By 1972, the seeming incapacity of the PTAR to reach its objectives provided Justice with at least an arguable legal excuse to file proceedings. But in fact, political motivations pervaded this network litigation from the outset.

A number of books and articles have documented in detail the antagonism that existed between President Nixon and networks' news operations during this era.[42] By 1969, this conflict was compounded by a swing in broadcast news sympathies from a relatively neutral to an aggressively anti-Vietnam War posture. In October 1969, presidential aide Jeb Magruder wrote the following memo to White House Chief of Staff H.R. Haldeman.

> The real problem that faces this administration is to get this unfair coverage in such a way that we make major impact on a basis in which the networks, newspapers and Congress will react to and begin to look at this somewhat differently... [We can] *utilize the antitrust division to investigate various media relating to antitrust violation. Even the possible threat of antitrust action, I think would be effective in changing their views in the above matter.*[43] [emphasis added].

Between 1970 and 1972, identical antitrust suits were prepared by the U.S. Department of Justice against the three networks individually.[44] These cases all substantiated their legal arguments by citing the precedent set in the Paramount Decision. Justice filed the suits over a two-year period because Attorney General John Mitchell was very sensitive about the network antitrust case appearing politically motivated.

In the first days of April 1972, however, John Mitchell left the Justice Department to become the chairman for the Committee to Re-elect the President (CREEP). Almost immediately thereafter, on April 14, 1972, the Department of Justice, acting on a directive from President Nixon's Chief domestic Advisor John Ehrlichman, filed suit against the three networks, claiming violations of sections 1 and 2 of the Sherman Antitrust Act.[45] The defendants quickly charged that the antitrust cases were politically rather than legally motivated and in early May 1972, Walker B. Comegys, the Acting Antitrust Chief for the Department of Justice, publicly rebutted these network claims by expressly denying that "news, public affairs, documentary and sports programs" were included in the present antitrust action.[46] Comegys' statement notwithstanding, intimidation was, of course, the issue, and the very fact that the suit was filed during a politically sensitive election year indicates just how strongly the Nixon Administration was inflamed at the networks' coverage of the news.

In the midst of this duel between the U.S. Department of Justice and the networks, separate but related legal action was being undertaken against the networks by several major film companies. In September 1970, an antitrust suit was filed against ABC and CBS because each network had begun producing feature films for theatrical release in 1967. The film studios did not appreciate either the added competition in the movie marketplace, or the eventual prospects of vying for network exposure against films produced by the broadcasters themselves. The latter complaint formed the basis for the legal arguments presented by the movie companies, since their lawsuit charged that the networks had violated the Sherman Act by

"producing theatrical feature films, and other entertainment for television audiences, and simultaneously controlling to the plaintiffs' detriment the principal exhibition outlets for prime-time network television exhibition.[47] The major film producer-distributors contended that the 1948 Paramount Decision had previously appropriated similar advantages from them in exhibiting their products.

Ironically, the networks also employed the Paramount Case as the means of supporting their position in this litigation. ABC pointed out that in the Paramount text the Supreme Court had stated that vertical integration, in and of itself, was not a per se violation of the Sherman Act. Instead, a structure consisting of a production-distribution-exhibition configuration was only illegal if it is "a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition," or if it creates a monopoly power "coupled with a purpose or intent" to exclude competition.[48] Eventually, the defendants won because the movie companies could not adequately prove their allegations that the networks had deliberately favored inferior films produced internally over the plaintiffs' movies. An inferior film was defined as a movie with "lower potential audience ratings." Legally, the argument came down to how anything as speculative as "lower potential audience ratings" can ever be grounds for a conviction.[49] Consequently, a District Court decided the case in favor of the networks,[50] although the legality of network vertical integration remained unresolved, at least for the time being.

The networks, however, did not fare as well in their attempts to rid themselves of the Justice Department's antitrust suits. In November 1974, several months after Richard Nixon's resignation, District Judge Robert J. Kelleher did, in fact, dismiss the cases "without prejudice" meaning the suits might be filed again.[51] The official reason given for Kelleher's action was the improper, political motives that caused the Nixon Administration to initiate the proceedings in the first place.[52] Nevertheless, any suspense as to the government's intentions in the matter was immediately dispelled when the U.S. Department of Justice refiled the case on December 10, 1974. The legal arguments in these new suits were "essentially identical" to those in the earlier proceedings,[53] since the government's complaint charged that:

> the three networks have engaged in a combination with their owned and operated television stations, their affiliates, and others to monopolize trade and commerce in television entertainment programs exhibited during prime evening hours in violation of Section 2 of the Sherman Act. Furthermore, it is charged, they have entered into contracts unreasonably restraining trade and commerce in television entertainment programs, in violation of Section 1 of the Sherman Act.[54]

As in the 1948 Paramount Decision, justification of the government's allegations was grounded in business and economic issues, rather than the matter of free speech. In the past thirty-five years, the Paramount Case has been cited in over a dozen FCC Reports as the authority for broadcasting's First Amendment protection. Still, free speech was an irrelevant argument in these antitrust suits. Instead, complaints by the Justice Department echoed the rationale of the Paramount Decision, relating "directly to the two major motifs in antitrust law."[55] First, Section 1 of the Sherman Act is designed to prevent those business practices that ultimately inhibit a free and open marketplace. Second, Section 2 is intended to protect all market competitors. The scopes of these two motifs obviously overlap in their concern over both restrictive business measures and who, in turn, is being restrained.

The Justice Department's antitrust action against the three networks during the 1970s was, by and large, directed at control by NBC, CBS, and ABC over the production of prime-time entertainment programming.[56] As stated earlier, the percentage of

joint production arrangements entered into by the networks rose dramatically between 1957 and 1968; and this pattern increased the already considerable influence of the networks over the business of prime-time TV production. Furthermore, the removal of tobacco advertising from television in 1971 adversely affected the relationship between the networks and their program suppliers. NBC, CBS and ABC lost 12 percent of all their advertising revenues because of this ban on tobacco ads,[57] and as a result, the networks further extended their control over television production as a means of adjusting to this loss in their advertising income. Consequently, the Justice Department had more than ample reason to refile the antitrust suits in December 1974 after the proceedings had been dismissed "without prejudice."

Then as now, the networks decided which programs would be selected for television exhibition. In addition, however, NBC, CBS, and ABC also reserved exclusive long-term renewal rights in the event of a program's success. The subsequent renewal fee was pre-set and standardized at such a level that the usual program supplier did not realize a profit unless the show in question lasted five years and went into syndication. By contrast, the network began earning compensation immediately. The three networks also shared in the syndication profits, in any program spinoffs, and in the control over all creative talent and program content. Each of the Justice Department's lawsuits contended that the authority of NBC, CBS, and ABC over prime-time programming in America was nearly absolute, although similar network domination in broadcast distribution and exhibition was, for the most part, ignored.

In spring 1975, the three networks appealed to the Supreme Court that their original suits should have been dismissed "with prejudice."[58] Then on March 25, 1975, Supreme Court Justice William O. Douglas ordered a temporary halt to the antitrust action while the Court considered this network petition for a Writ of Certiorari.[59] In November 1975, the networks moved for summary judgment on their suits, but while this motion was pending, NBC signed a settlement agreement on November 17, 1976, making concessions and freeing itself from further litigation.[60] NBC's consent decree also contained a clause providing that the provisions of the agreement would not take effect until CBS and ABC either settled or lost their cases in court.[61] CBS and ABC reacted to the NBC decision by expressing their steadfast resolution to continue contesting the suits, which they did for four years. CBS finally signed a consent decree on July 31, 1980,[62] while ABC settled on November 14, 1980.[63] Both of these judgments had provisions similar to the agreement previously signed by NBC. In summary, the major conditions in the three consent decrees are:

1. These three networks cannot acquire any financial or proprietary interests in any television program that is produced solely or in part by an independent program supplier, other than the right to the network exhibition of the program.
2. These three networks cannot syndicate their programming domestically or internationally, except under severe restrictions.
3. For ten years, these three networks must limit the hours of prime-time, daytime, and fringe hour programming that each produces.
4. These three networks cannot purchase a program from an independent program supplier for network exhibition on the condition, expressed or implied, that any other interests in the program are to be surrendered.
5. For fifteen years, these three networks cannot purchase a program from an independent program supplier and stipulate that the program must be produced utilizing network production facilities. Only live programs are exempted from this stipulation.
6. For ten years, none of these three networks can mutually arrange program buys with either of the other two networks that results in the former purchasing a program from the latter on the con-

dition that the latter purchase one from the former.

7. These three networks can only renew a prime-time network program for four years under the terms of the original contract. After that time period, a new agreement must be reached.
8. These three networks are limited in the time each has to option pilots and tie up spinoffs and creative talent.[64]

By 1981, the U.S. Department of Justice had decisively altered the control of the three networks over prime-time programming in America. Clearly, NBC, CBS, and ABC had made substantial concessions. But the networks had also avoided a final confrontation in the Supreme Court and, in turn, bypassed even more serious consequences, including "divestiture, dissolution or divorcement."[65] Thus, no new legal ground over the issue of vertical integration in a mass communications industry was broken in this most recent network antitrust litigation, leaving the 1948 Paramount Case as the precedent still to be followed. Furthermore, as in the case of the Paramount Decision, the question remains of whether the limiting of one branch in a vertically integrated communications industry is enough to ensure market competition, especially if that regulated tier is not distribution. In other words, is the broadcast marketplace substantially more open and free today as a result of the network antitrust proceedings of the past decade? Again, as with the Paramount litigation, it appears that the results of these consent decrees are mixed at best.

IV. Discussion and Conclusions

As noted earlier, it is both interesting and ironic that the 1948 Paramount Decision has had a more demonstrable effect on subsequent broadcast antitrust matters than the 1943 NBC Decision. The ultimate result of the NBC litigation was to conclusively alter the structure of the broadcast industry in a way that far surpassed the influence of Paramount on the movie business. But the Paramount Case was first and foremost an antitrust decision, while *U.S. v. NBC* was principally a suit concerned with the power of the FCC, not the Sherman Act. As a result, *U.S. v. Paramount* has survived as the primary legal precedent for antitrust proceedings in America's post-World War II mass communications industries.

As early as 1938, the government had expressed its intention of establishing the Paramount Case as a paradigm for future antitrust actions. An official statement issued by the Department of Justice said:

> In addition to the benefit to this particular (the movie) industry and its patrons, the present suit may settle questions that are vital in the application of the anti-trust laws to other industries in which manufacturers or producers, knit together through a common trade association, seek directly or indirectly to dominate and control markets.[66]

Thus, the Paramount Decision was tailor-made to serve as a legal precedent for future antitrust cases, and it subsequently proved especially relevant to the issue of monopolistic practices in network television in the U.S.

The authority of the 1948 Paramount Case only intensified as time wore on. In the 1956 Congressional Hearing, Paramount was cited as a model to test ownership patterns in broadcasting. Later in that decade and during the 1960s, *U.S. v. Paramount* would be periodically employed as a standard providing direction in legal controversies involving both broadcast antitrust and free speech issues. It wasn't until the 1970s, however, that the U.S. Department of Justice aggressively tested the Paramount Decision as a precedent against the networks; as a result, its legal stature increased.

Both the Paramount Decision and the network antitrust actions of the 1970s applied a rather reductionistic view of the industrial structure. Instead of analyzing either the motion picture or the

broadcast industry as a whole system with horizontal as well as vertical relations, the network proceedings merely borrowed Paramount's conceptual reliance on within-company vertical integration. Indeed, Paramount emphasized the link between distribution and exhibition, while the concern of the network case involved production and distribution. Nevertheless, the results were identical. In each case the defendants suffered economic discomfort from the resulting decisions; still, the movie studio and the broadcast network oligopolies remained intact, despite their respective consent decrees.

What then of the free and open marketplace ideal projected by the U.S. Department of Justice, the District Courts, the Supreme Court, and the FCC? Clearly, this ideal is in conflict with the corporate realities of the contemporary American marketplace. Every U.S. mass communications industry today exhibits an oligopolistic structure,[67] and oligopolies must be atomized if a free and open marketplace is to be genuinely promoted. Specifically, strong measures need to be taken to realign the horizontal structure linking an industry's major companies. In both Paramount and the network proceedings, however, the courts did not take the steps adequate to ensure this marketplace ideal. In each case one of the secondary tiers, exhibition or production, was atomized, which served to temporarily increase the number of motion picture theatre owners and television program suppliers in the film and broadcast marketplace. Still, the dominant tier today in the broadcasting as well as the movie business is distribution. The major distributors manipulate both supply and demand in order to secure, as much as possible, the stability and survival of their respective oligopolies. As a result, each marketplace is more closed than open; and neither the Paramount Decision nor the subsequent network proceedings affected distribution's control over either industry.

The crucial issue here is not the sheer volume of competitors, but in which industrial tier these new companies appear. After Paramount, the new motion picture theatre owners were still dependent upon the major producer-distributors for quality product. Consequently, the major film companies kept supply low and theatre owner demand high by cutting in half the total number of films they produced to retain ultimate control over the movie marketplace. Likewise, it is today in the best interest of the three networks to have a multitude of independent program suppliers operating in the broadcast industry. The network proceedings have created and environment in which an ever greater number of program ideas are flowing in the direction of the networks. But the bottom line remains that NBC, CBS, and ABC determine which shows are selected for network exhibition. In this way, the networks ultimately control their marketplace as well.

Nevertheless, the forces of environmental change are again shaking the foundation of the dominant oligopoly. Forty years ago, the major film studios had to contend simultaneously with the growth of television, the probe from the House Committee on Un-American Activities, increased competition from the imported products of foreign film industries, and legal challenge from the courts. Today, the structure of the broadcast industry is also being challenged, this time by the emergence of the new video technologies. As David J. Londoner pointed out in a report written for Wertheim and Company in 1978:

> Technology is once again changing the means of distributing entertainment. This time it has produced convenient methods for distributing more or better video entertainment directly into the home. Pay cable, offering first run movies, sports and specialized viewing, is one means; video cassette, either tape or disc, is another. Over the air pay-TV is a third, and two-way cable, such as Warner's QUBE, is the fourth. Satellite transmission of video product is another development worth watching. The next ten years will witness the

> blossoming of one of more of these distribution methods. It will again alter the economics of entertainment.[68]

Therefore, although the legal system did not take the necessary steps to curb the power of the network-distributors and open up the broadcast marketplace, changes caused by the evolution of television and video technology should have a considerable and lasting effect on the market power of NBC, CBS, and ABC in the future. David J. Londoner:

> Longer range, say over a twenty-year period, the networks will become only three of many channels of distribution, and, with less absolute control over the dissemination of programming will have to bid more competitively for both programs and audiences.[69]

What importance will the 1948 Paramount Decision have in the communications environment of the 1980s? On the one hand, the U.S. Department of Justice started reviewing the Paramount Decision on October 21, 1981, to decide whether or not to modify this ruling in any way. Assistant Attorney General William Baxter, who is also the head of the Justice Department's antitrust division, has pledged to "examine the more than 1,200 outstanding antitrust judgments the Government has won since the Sherman Act was passed in 1890.[70] Baxter decided to begin this massive process with the Paramount Decision because "the age, significance and complexity of those judgments (the individual consent decrees), their apparent success . . . and the many profound changes in the motion picture industry since the judgments were entered,"[71] make this case an ideal starting point. In contrast, the relevance of Paramount has already been mentioned in respect to the regulation of the cable industry. Although the major cable companies are not currently under investigation by the FCC or Congress, a report recently written for the cable industry speculates as follows:

> There has been theoretical support among regulators over the years for the separation of cable system ownership and control and/or ownership of programming. No specific proposals have surfaced largely because even the proponents feel the industry should be given a chance to develop and mature first. Recent court rulings affirming that cable is not a common carrier also take some of the sting out of the logic of separations. The question, however, concerns not only separation of control, as in common carriers, but ownership. For instance, just as motion picture companies were forced to divest their theatres to prevent them from favoring their own outlets, should a Time, Inc., Warner Communications, Viacom, or Teleprompter be barred from owning both cable systems and companies producing product for such systems?[72]

While the theory and attitude expressed in the Paramount text has proven ineffective in procuring a free and open media marketplace, the Paramount Decision is also the most substantive legal precedent available for the purpose of regulating ownership and structure in the broadcasting, movie, or cable industries. No other case has yet redefined the Paramount model. But some alternative legal paradigm involving antitrust and the electronic media and/or film will clearly be necessary to cope with the increased concentration of ownership and the trend toward conglomeration in America's mass communications industries in the 1980s.[73]

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[1]"Justice vs. the Networks," *Newsweek*, April 24, 1972, p. 55.

[2]Besides Loew's Theatres, United Paramount Theatres, National Theatres, RKO Theatres and Stanley Warner Theatres, which were all linked to the five major studies, every other American theatre owner was technically considered to be an independent exhibitor. Some of the large independed theatre chains, however, did enter into collusive deals with the eight Paramount defendants; consequently, these "independent" exhibitors were sympathetic to the concerns of the major studios.

[3]Hollywood's five major film studios were MGM/Loew's, Paramount, Twentieth-Century Fox, RKO and Warner Brothers. The two additional producer-distributors were Columbia and Universal, while United Artists functioned strictly as a distributor.

[4]Section 1 of the Sherman Antitrust Act states "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal "26 STAT 209 (1890) 15 U.S.C / (1952).

[5]Section 2 of the Sherman Antitrust Act states "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person to monopolize any part of the trade or commerce among several states, or with foreign nations, shall be deemed guilty." 26 STAT 209 (1890) 15 U.S.C./1 (1952).

[6]The definitive text on the Paramount litigation is the remarkable book by Michael Conant, *Antitrust in the Motion Picture Industry* (Berkeley: University of California Press, 1960). A brief chronology of the litigation follows:

1938 The Justice Department files an antitrust suit against the eight major movie companies charging combination and conspiracy to restrain and monopolize trade and commerce in violation of the Sherman Act.

1940 Paramount, Loew's, RKO, Warner Brothers and Twentieth-Century Fox sign consent decrees agreeing:
1. not to offer a "block" of more than 5 films;
2. not to blind book, or rent a film without a trade showing;
3. not to require theatres to rent shorts as a means of securing features, and
4. not to acquire any more theatres for a short specified time.

1944 Dissatisfied with the results of the 1940 consent decrees, the Justice Department again files suit against the eight major film companies. The case goes to trial in October 1945.

1946 The Federal District Court in the Southern District of New York finds the Paramount defendants guilty of the Sherman Act, but suggests more lenient measures than divestiture as a solution. The Justice Department appeals.

1948 The Supreme Court hands down the Paramount Decision, upholding the District Court's guilty verdict. Also, the case is remanded back to the lower court and the divestiture principle is employed there, splitting exhibition from the five major studios. In addition, a number of trade restraining practices are outlawed, including block booking.

[7]*United States v. Paramount Pictures*, 334 U.S. 131, 141 at note 3 (1948).

[8]Ibid., 161.

[9]Ibid., 166.

[10]William E. Lee, "Antitrust Enforcement, Freedom of the Press, and the 'Open Market,' the Supreme Court on the Structure and Conduct of Mass Media," *Vanderbilt Law Review*, November 1979, p. 1309.

[11]Eventually, the Supreme Court remanded the case to the District Court, which would make the final decision. See: *United States v. Paramount Pictures*, 334 U.S. 131, 173-175 (1948).

[12]*United States v. Paramount Pictures*, 85 F. Supp. 881, 887 (S.D.N.Y. 1949), aff'd per curium, 339 U.S. 974 (1950).

[13]RKO Pictures is the only member of the original eight Paramount defendants which is no longer a major force in the movie business. RKO left the film industry in 1955.

[14]The plight of the independent theatre exhibitor was so severe in the early 1950s that Congressional hearings were held to investigate the matter: *Problems of Independent Motion Picture Exhibitors Relating to Distribution Trade Practices*, hearings before a subcommittee of the select Committee on Small Business, U.S. Senate, 83rd Congress, 1st Session (Washington, D.C.: Government Printing Office, 1953). Three years later, a new set of hearings were conducted on what had become a continuing problem: *Problems of Independent Motion Picture Exhibitors*, hearings before a subcommittee of the Select Committee on Small Business, U.S. Senate, 84th Congress, 2nd Session (Washington, D.C.: Government Printing Office, 1956).

[15]"Justice Department Statement of Suit Against Leading Movie Interests," *The New York Times*, July 21, 1938, p. 6, column 5.

[16]Lee, p. 1340

[17]For an excellent analysis of the Paramount Decision see: J. McDonough, Jr. and R. Winslow, "The Motion Picture Industry: United States v. Oligopoly," 1 *Stanford Law Review* 385 (1949).

[18]*National Broadcasting Company v. United States*, 391 U.S. 190 (1943).

[19]*FCC Report on Chain Broadcasting*, Commission Order No. 37, FCC Docket No. 5060, May 1941. Also see: 6 Fed. Reg. 2282, 2292, 5257 (1941).

[20]Lee, p. 1317.

[21]*National Broadcasting Company v. United States*, 319 U.S. 190, 213, 216 (1943).

[22]Ibid., 227.

[23]One of the FCC's eight network regulations prohibited a network from operating more than one network at the same time. See: *FCC Report on Chain Broadcasting*, pp. 70-72.

[24]Sydney W. Head with Christopher H. Sterling, *Broadcasting In America*, Fourth Edition (Boston: Houghton Mifflin, 1982), pp. 157, 338-339.

[25]See *Hearings on Monopoly Problems in Regulated Industries* Before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 84 Congress, 2nd Session, ser. 22, pt. 2—Television (1956) and *The Network Monopoly*, Report Prepared for the Use of the Committee on Interstate and Foreign Commerce, Senate, 84 Congress, 2nd Session (Washington, D.C.: U.S. Government Printing Office, 1956).

[26]Senator John W. Bricker, *The Network Monopoly*, Report Prepared for the Use of the Committee on Interstate and Foreign Commerce, Senate, 84 Congress, 2nd Session (Washington, D.C.: U.S. Government Printing Office, 1956), p. 22.

[27]Bricker, p. 2.

[28]In Donn Delson, *The Dictionary of Marketing and Related Terms in the Motion Picture Industry* (Thousand Oaks, CA: Bradson Press, 1979), p. 16, block booking is defined thus: "governed by the Paramount Consent Decree of 1948, major distributors were forbidden to employ the practice of the tying together of one or more motion pictures for licensing within a market. The basic premise of this decree is that motion pictures must be licensed picture by picture, theatre by theatre, so as to give each exhibitor an equal opportunity to show a given film."

[29]*FCC Report on Chain Broadcasting*, pp.36-40.

[30]25 Fed. Reg. 9051 (1960).

[31]*FCC Report and Order*, adopted September 4, 1963, Docket No. 12859, 25 $$ 1651-1686 (g).

[32]Walter B. Emery, *Broadcasting and Government* (East Lansing: Michigan State University Press, 1971), p. 310.

[33]See United States v. Paramount Pictures, 334 U.S. 131, 156-159 (1948).

[34]For the FCC, the prime-time access rule originally restricted "the broadcast by commercial stations in the top fifty markets in which there are three or more operating commercial television stations to no more than three hours of network programs between the hours of 7:00 and 11:00 p.m. (6:00 and 10:00 Central time), thereby opening up evening time to competition among present and potential alternate program sources." The FCC sets prime-time (the television viewing period when the overall audience is the largest) as the hours between 7:00 and 11:00 p.m. for the Eastern, Mountain, and Pacific Time Zones, and between 6:00 p.m. and 10:00 p.m. for the Central Time Zone.

[35]*FCC Report and Order*, adopted May 4, 1970, 23 FCC 2d, 382.

[36]FCC 2d, 382, 389.

[37]Ibid., p. 384.

[38]Ibid., p. 427.

[39]There are a number of programming exemptions and exceptions where the networks and their affiliates can periodically sidestep the PTAE. Still, access time is meant to be filled with either locally produced or syndicated non-network programming. Usually, nationally syndicated shows dominate since local productions tend to draw a much smaller audience. Consequently, these off-network syndicated series are stripped Monday through Friday, while local programming is really only afforded access on Saturday.

[40]"Memorandum Opinion and Order," 35 FF 2d, 320 (1972), p. 322.

[41]Ibid., p. 323.

[42]See E. Efron, *The News Twisters* (Los Angeles: Nash, 1971); William Blankenburg, "Nixon vs. the Networks: Madison Avenue and Wall Street," *Journal of Broadcasting*, Spring 1977; E. Krasnow and L. Longley, *The Politics of Broadcast Regulation*, Second Edition (New York: St. Martin's Press, 1979), p. 59.

[43]P. Laskin "Television Antitrust: Shadowboxing with the Networks," *Nation*, June 14, 1975, p. 715.

[44]See *United States v. National Broadcasting Company*, C 72-819; *United States v. CBS, Inc.*, C-72-820; and *United States v. American Broadcasting Companies*, C-72-821 (C.D. Col. filed April 14, 1972).

[45]"Justice vs. the Networks," p. 55.

[46]"TV News Programs are not Involved in Antitrust Suits, Says Justice Official," 562 *Antitrust and Trade Regulation Report*, February 12, 1974.

[47]"Film Producers Fail in Bid to Temporarily Enjoin ABC from Exhibiting its Own Films," 650 *Antitrust and Trade Regulation Report*, February 12, 1974, p. A1.

[48]Ibid.

[49]See "Antitrust Violation as a Defense to Breach of Contract: An Expanded Policy Analysis," *University of Miami Law Review*, Summer 1976, p. 33.

[50]See *Columbia Pictures Industries, Inc., et al. v. American Broadcasting Companies et al.* (S.D.N.Y. 1974).

[51]Likewise, a dismissal "with prejudice" means the case cannot be reissued again.

[52]See "District Judge Dismisses Gov't Suit Against Three Major Television Networks," 689 *Antitrust and Trade Regulation Report*, November 19, 1974, p. A13.

[53]Jay Fastow, "Competition, Competitors and the Government's Suit Against the Television Networks," 22 *The Antitrust Bulletin* 3, Fall 1977, p. 517.

[54]"Justice Department Alleges Monopolization of Prime Time Programming by Major TV Networks," 559 *Antitrust and Trade Regulation Report*, April 18, 1972, p. A4.

[55]Fastow, p. 518.

[56]The courts defined entertainment programming as "any program, including a feature film, exhibited or intended to be exhibited on television other than the following programs: news, public affairs, agricultural, religious, instructional and sports."

[57]David J. Londoner, "The Changing Economics of Entertainment," Report written for Wertheim & Co., Inc., 1978, p. 11.

[58]"Douglas Orders Temporary Halt to Justice Suits Against Networks," 707 *Antitrust and Trade Regulation Report*, April 1, 1975, p. A36.

[59]*National Broadcasting Company v. United States, Petition for Writ of Certiorari*, No. 74-1001, S. Ct.

[60]*United States v. National Broadcasting Company*, No. 74-3601-RJK (C.D. Col. November 17, 1976).

[61]"NBC Agrees to Limit Program Time, Financial Ties with Independent Producers," 790 *Antitrust and Trade Regulation Report*, November 23, 1976.

[62]*United States v. CBS, Inc.*, 74-3599-RJK (C.D. Col. July 31, 1980).

[63]*United States v. American Broadcasting Companies*, 74-3600-RJK (C.D. Col. November 14, 1980).

[64]These points have been extracted from the original text of the consent decrees listed in footnotes 60, 61, 62.

[65]Fastow, pp. 531-532, note 6.

[66]"Justice Department Statement of Suit Against Leading Movie Interests," p. 6, column 5.

[67]In John Larmett, Elias Savada and Frederic Schwartz, Jr., *Analysis and Conclusions of the Washington Task Force of the Motion Picture Industry* (Washington, D.C.: 1978), p. 8, different types of market structure are generally defined as "monopolistic, oligopolistic, or atomistic. In a monopoly, one seller totally controls the market. In an oligopoly, there are a small number of sellers who control the market and who, while they compete against each other in some areas, are interdependent in terms of price and output. In an atomistic industry, no seller is large enough to control the marketplace."

[68]Londoner, p. 30.

[69]Ibid., p. 4.

[70]"Justice Dept. Studies Theatre Anti-Trust Rules," *The Blade: Toledo, Ohio*, Thursday, October 22, 1981, p. 27.

[71]Ibid.

[72]"Industry View point: The Cable Television Industry," Report written by Donaldson, Lufkin & Jenrette Securities Corporation, November 16, 1979, p. 38.

[73]For background reading on concentration of ownership and conglomeration in American's mass communications industries, see Benjamin M. Compaine (ed.), *Who Owns the Media? Concentration of Ownership in the Mass Communications Industry* (White Plains, NY: Knowledge Industry Publications, 1979).